No. 11048

# In the United States Circuit Court of Appeals for the Ninth Circuit

E. H. CLARKE LUMBER COMPANY, AN OREGON CORPORATION, APPELLANT

*v.*

P. N. KURTH, APPELLEE

and

P. N. KURTH, APPELLANT

*v.*

E. H. CLARKE LUMBER COMPANY, AN OREGON CORPORATION, APPELLEE

*APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON*

## BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE


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# SUBJECT INDEX



## INDEX OF CASES





668873—45——1

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## BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

The Administrator of the Wage and Hour Division, United States Department of Labor, is charged with the duty and responsibility of administering and enforcing the Fair Labor Standards Act. Because this case presents a fundamental question of enforcement of the Act the Administrator, with leave of Court, submits this brief as *amicus curiae*.

### STATEMENT

Plaintiff-appellee instituted this action on February 10, 1944 (R. 29), under Section 16 (b)[1] of the Fair Labor Standards Act

[1] Section 16 (b) provides: "Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees

of 1938,[2] to recover unpaid overtime compensation, an equal amount as liquidated damages, and attorneys' fees. The amounts claimed were alleged to have become due during the plaintiff's employment between July 1941 and September 1942 (R. 29). The defendant's answer alleged that the suit was not commenced within the time limit provided by Chapter 265, Oregon Session Laws, 1943 (Labor Code, Sec. 102–607 (b)), which reduced from six years to 90 days on claims theretofore accrued, and to six months on claims thereafter accruing, the period of limitation for suits to recover overtime pay and penalties.

The full text of Chapter 265 reads as follows:

> SECTION 1. Recovery for overtime or premium pay accrued or accruing, including penalties thereunder, required or authorized by any statute shall be limited to such pay or penalties for work performed within six months immediately preceding the institution of any action or suit in any court for the recovery thereof; provided, that an action may be maintained within a period of 90 days after the effective date of this act on claims heretofore accrued.
>
> SECTION 2. Any law in conflict herewith to that extent is repealed hereby.
>
> SECTION 3. It hereby is adjudged and declared that existing conditions are such that this act is necessary for the immediate preservation of the public peace, health, and safety; and an emergency hereby is declared to exist, and this act shall take effect and be in full force and effect from and after its passage.

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affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

[2] C. 676, 52 Stat. 1060, 29 U. S. C. sec. 201, et seq.

This law became effective on March 10, 1943.[3] The applicable statute of limitation prior to the enactment of Chapter 265 provided a six-year period of limitation as follows: "Within six years, * * * (2) upon a liability created by statute, other than a penalty or forfeiture" (Oregon Compiled Laws 1940, Section 1–204).[4]

The district court held [5] that "the period of 90 days afforded by Chapter 265 for the maintenance of this action is unreasonably short and that said law as it affects this action is unconstitutional and void for the following reason: That it unreasonably interferes with the normal operation of the Fair Labor Standards Act and thereby violates [the Commerce Clause] of the United States Constitution in that it unreasonably interfered with the power of Congress to regulate commerce among the several States * * *." The court found, therefore, "that this action was brought within the time provided by law" (R. 37) and entered judgment for the plaintiff (R. 38).

The appellant argued in the court below that even though the 90-day limitation should be determined to be unconstitutional, "the entire act does not as a result of that fall" (R. 94). We shall show that the reasons for holding the 90-day savings clause unconstitutional are equally applicable to the six months limitation on accruing and future causes of action.[6] Since the Administrator is primarily interested in

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[3] Thus, the action herein was commenced about eleven months after the effective date of the statute.

[4] The period of limitation for an action on a penalty is from one to three years (Oregon Compiled Laws, 1940, secs. 1–206, 1–208). The liability provided by Section 16 (b) is not a penalty. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572; *Brooklyn Savings Bank* v. *O'Neil*, 65 S. Ct. 895; *Culver* v. *Bell & Loffland*, 146 F. (2d) 29 (C. C. A. 9).

[5] The findings of fact and conclusions of law are recorded at 8 Wage Hour Rept. 69.

[6] In the absence of a legislative declaration of severability, "the presumption is that the legislature intends an act to be effective as an entirety." See *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 241–242. It is evident that the 90 days savings clause of Chapter 265 is simply auxiliary to the six months provision and that the two periods are "so mutually connected with and dependent on each other * * * as to warrant the belief that the legislature intended them as a whole." Cooley on Constitutional Limitations, 7th Ed., p. 247; *Mendiola* v. *Graham*, 139 Ore. 592, 10 P. (2d) 911, 918 (Ore. 1932).

the future application of the statute of limitations, this brief is directed at the six months provisions.

## SUMMARY OF ARGUMENT

The Fair Labor Standards Act does not prescribe any period of limitation for suits brought by employees under Section 16 (b) of the Act. Therefore, the applicable valid state statute of limitation admittedly governs.[7] We will show, however, that this does not mean that a state is free to prescribe a limitation period which discriminates against claims under a Federal statute, or is inconsistent with or interferes with the terms, policies, and enforcement of a Federal statute.

The theory on which the State statutes of limitations apply to rights created by Federal statutes is that the Rules of Decision Act requires the application of "the laws of the several States except where the Constitution, treaties, or states of the United States otherwise require or provide * * *" (28 U. S. C. A. 725 (R. S. 720)). But it is well established that the Rules of Decision Act does not require the application of a State statute which discrimnates against Federal claims (*Campbell* v. *Haverhill,* 155 U. S. 610, 615; *Pufahl* v. *Parks,* 299 U. S. 217), or which "would be inconsistent with the terms or defeat the purposes of the legislation of Congress" (*Hills* v. *Hoover,* 220 U. S. 329), or defeat "the assertion of Federal rights" (*Davis* v. *Wechsler,* 263 U. S. 22, 24); or which is invalid because it does not allow a reasonable period for resort to the courts for enforcement of the class of rights subjected to the limitation (*Campbell* v. *Haverhill, supra; Lamb* v. *Powder River Livestock Co.,* 132 Fed. 434, 439 (C. C. A. 8); *Terry* v. *Anderson,* 95 U. S. 628, 633).

We contend that Chapter 265 is defective in all these respects, and that it is invalid and unconstitutional as applied to claims under the Fair Labor Standards Act for the following reasons:

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[7] *Campbell* v. *Haverhill,* 155 U. S. 610; *Chattanooga Foundry & Pipe Works* v. *City of Atlanta,* 203 U. S. 390; *Culver* v. *Bell & Loffland,* 146 F. (2d) 29 (C. C. A. 9); "Employee Remedy Under the Fair Labor Standards Act," by G. W. Crockett, Jr., 1 National Bar Journal 16–29 (July 1941).

(1) It discriminates against Federal claims in violation of Article VI of the Constitution.

(2) It unreasonably interferes with the assertion of Federal rights and defeats the purposes of Federal legislation in violation of Article VI of the Constitution.

(3) It also unreasonably interferes with Federal regulation of interstate commerce in violation of Article I, Section 8, of the Constitution.

(4) The limitation period provided by Chapter 265 is so short as to deprive claimants of a reasonable opportunity to resort to the courts, and thus deprives them of due process of law in violation of the 14th Amendment to the Constitution.

## ARGUMENT

### I

### Chapter 265 discriminates against rights arising under a Federal law in violation of Article VI of the Constitution of the United States

Although Chapter 265 is drafted so as to apply to suits for overtime compensation authorized by any statute, whether State [8] or Federal, it seems clear that the sole purpose of the State Legislature was to cut short the remedy available to employees under the Fair Labor Standards Act.[9] Appellant's

[8] There are two State statutes which may be within the scope of the terms of Chapter 265: O. C. L. A., secs. 102–323, which provides that time and a half should be paid to female employees for time in excess of 10 hours per day in certain industries; and O. C. L. A., secs. 102–502, which provides that employees working overtime in certain industries must be paid time and a half.

[9] In this respect, the Oregon statute is more adroitly drafted than a similar statute enacted by the Iowa Legislature at approximately the same time. See Chapter 267, Acts of 50th General Assembly of State of Iowa, enacted March 19, 1943. The Iowa statute reduced from five years to six months the limitation period on all claims arising "pursuant to the provisions of any Federal statute where no period of limitation is prescribed." This statute was held invalid in *Elliott* v. *Morrell & Co.*, 7 Wage Hour Rept. 1012 (S. D. Iowa, 1944), and *Kappler* v. *Republic Pictures Corp.*, 59 F. Supp. 112 (S. D. Iowa), and was thereafter repealed on March 29, 1945. (S. B. 94 repealing ch. 267, L. 1943.) At the same time a two-year statute was enacted for the recovery of a liability for failure to pay wages. See also

brief in the district court frankly pointed out that "it is no secret that [at] the 1943 session the legislature believed [that] to promote the welfare of the State every concern should be shown for 'business' therein, not only to aid those then engaged in business, but to attract others,"[10] and noted that "the hazards confronting employers" subject to the Fair Labor Standards Act were "very important in 1943 when the legislature met" (dft. br. in dist. ct., p. 28). As part of a general program to offer more favorable conditions to employers, the legislature enacted Chapter 265.

It is evident that the legislature was not concerned with the effect of State laws which allow overtime compensation. The impact of these laws in creating liability for employers is almost negligible. Sections 102–323, Oregon Session Laws, relate to women employees working more than 10 hours a day in harvesting, packing or canning; and sections 102–~~505~~,501 Oregon Sessions Laws, prohibit employment in any manufacturing establishment for more than 10 hours in any one day;[11] but permit overtime work not to exceed three hours in one day on condition that payment be made for said overtime at the rate of time and one-half the regular wage.

These statutes are typical State maximum hour laws designed primarily to prohibit completely overtime in excess of the prescribed daily hours rather than to require compensation or to subject employers to financial liability. That these State

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*Keen* v. *Mid-Continent Petroleum Corp.*, 58 F. Supp. 915 (N. D. Iowa), where the court avoided applying the Iowa six months' statute by holding that claims under the Fair Labor Standards Act are contractual in nature.

[10] See defendant's brief in the district court, p. 31. The 1943 session of the State Legislature, as part of the program to make the State more attractive to industry, created a Committee on Postwar Readjusment and Development. See Chapter 63, Oregon Laws, 1943. Among its duties was a mandate "to promulgate a plan or program designed to induce and encourage the establishment of new industries and businesses within the State" (ch. 63, sec. 3 (d)). And see *Automotive News of the Pacific Northwest*, May 1944, p. 8, where in a leading article entitled "Wage-Hour Persecutions Must Be Stopped," it is stated that to protect businessmen from wage restitution demands under the Fair Labor Standards Act, "we joined with other business interests in securing enactment of a law, at the 1943 session of the Oregon Legislature, establishing a limit of six months on suits for overtime pay."

[11] Or for more than eight hours per day in sawmills and logging camps.

statutes were not responsible for the passage of the "emergency" limitation statute here in question is evident from the admitted fact that they "have been in effect in Oregon for many years" (see appellant's br., p. 17) without causing any emergency. As appellant's brief plainly if inadvertently indicates, the "emergency" at which the statute is aimed came "with the advent of the Fair Labor Standards Act" (*ibid.*).

The fact that a Federal Statute was singled out for an unreasonably short period of limitation does not appear explicitly in the terms of Chapter 265. However, as the Supreme Court has repeatedly pointed out "In whatever language a statute may be framed, its purpose must be determined by its nature and reasonable effect * * *." *Henderson* v. *New York,* 92, U. S. 259, 268; *Minnesota* v. *Barber,* 136 U. S. 313, 319; *Brimmer* v. *Rebman,* 138 U. S. 78, 82; *Foster Packing Co.* v. *Hadell,* 278 U. S. 1, 11. A State many not "under the guise of exerting its police powers * * * make discriminations" in contravention of Federal rights or powers. *Brimmer* v. *Rebman, supra.* "For when the question is whether a Federal act overrides a State law, the entire scheme of the statute must of course be considered, and that which needs must be implied is of no less force than that which is expressed." *Savage* v. *Jones,* 225 U. S. 501, 533.

However normal may be the desire of the State to foster and encourage its local business interests, the law is clear that this cannot be done at the expense of or by discrimination against Federal legislation. As the Supreme Court said in *McKnett* v. *St. Louis & S. F. Ry.,* 292 U. S. 230, 234, "A State may not discriminate against rights arising under Federal laws." In the *McKnett* case, the Court held unconstitutional an Alabama statute which deprived its State courts of jurisdiction over transitory causes of action arising in other states under Federal law although conferring jurisdiction with respect to transitory causes of action arising under the common law or statute law of other States. Plaintiff brought action in Alabama under the Federal Employers' Liability Act to recover damages for an injury suffered in Tennessee. The Supreme Court held that the plaintiff could not be excluded from the

state courts "because he is suing to enforce a federal act." 292 U. S. at 234. Where the right arises "not from the state law but from the federal * * * the courts of the several states must remain open to such litigants on the same basis that they are open to litigants with causes of action springing from a different source," said the Supreme Court in a more recent case. See *Miles* v. *Illinois Cent. R. Co.*, 315 U. S. 698, 703, holding that a State court was without power to enjoin a resident citizen from prosecuting or furthering an action under the Federal Employers' Liability Act in a state court of another State which had jurisdiction under the Act. "This is so because the Federal Constitution makes the laws of the United States the supreme law of the land * * *" (*id.* at 703–704).[12] Although four of the Justices dissented from the result arrived at by the majority, the dissenting opinion agreed that the states could not, under the Constitution, discriminate against Federal rights. Mr. Justice Frankfurter, writing the dissenting opinion, pointed out that "Of course, since a federal right is involved, no state court can screen denial of or discrimination against a federal right, under guise of enforcing its local law" (315 U. S. at 721).

While the question of the validity of a discriminatory state statute of limitations has never been before the Supreme Court, its decisions clearly indicate that State statutes of limitations are to be applied to Federal claims only if such statutes are nondiscriminatory. See *Campbell* v. *Haverhill,* 155 U. S. 610; *Pufahl* v. *Parks,* 299 U. S. 217. Thus, in *Campbell* v. *Haverhill,* where the Court upheld the application of the local statute of limitations to a patent infringement action instituted in a Federal court, the Court recognized a different result might be reached with respect to "statutes passed in manifest hostility to Federal rights or jurisdiction," or with respect to statutes "discriminating against causes of action enforceable only in the Federal courts; as if they should apply a limitation of a year to actions for the infringement of patents, while the or-

[12] The pertinent provision of Article VI of the Constitution provides: "This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

dinary limitation of six years was applied to all other actions of tort" (155 U. S. at 615). See also *Pufahl* v. *Parks, supra,* where the Court upheld the application of a State statute of limitations to an action by the receiver of a national bank against the bank's stockholders to recover on a liability arising under a Federal statute, pointing out that the local statute governed *"if the state does not discriminate against the receiver's claim in favor of others of equal dignity and like character"* and *"provided those laws are nondiscriminatory and operated equally upon all claims of the class to which his belongs"* (299 U. S. at 227). [Italics supplied.]

The statute involved in the instant case does discriminate against Federal rights and was passed in "manifest hostility to federal rights." Claims for "overtime or premium pay * * * required or authorized by the statute" are singled out from all other kinds of statutory claims, from all other wage claims, and from all other claims arising out of employment contracts, and are subjected to a drastically abbreviated limitation period of six months as contrasted with a six-year limitation period applicable to all other actions upon statutory or contractual liability. Included among the claims to which the ordinary limitation of six years applies are a number of claims "of equal dignity and like character"; for example, statutory minimum wage claims, and claims for overtime compensation and premium pay required by employment, or union contracts. Thus employees who have individual contracts, or union contracts, requiring overtime or premium pay, have a six-year period of time within which to institute action on their claims, but employees with no bargaining power who must rely upon the Fair Labor Standards Act would be restricted to the six-months period of Chapter 265.

We submit that this is obviously the type of discriminatory statute the Supreme Court had in mind in indicating the constitutional restrictions upon State action with respect to Federal laws. As we shall show in the following sections of this brief, the discriminatory character of Chapter 265 is particularly objectionable because it substantially defeats the purposes of and interferes with the operation of a Federal statute designed primarily "to aid the unprotected, unorganized, and lowest paid

of the nation's working population" and to protect them "from substandard wages and excessive hours which endanger the national health and well-being and free flow of goods in interstate commerce." *Brooklyn Savings Bank* v. *O'Neil,* 65 S. Ct. 895, 896.

## II

**Chapter 265 unreasonably interferes with the assertion of rights provided by the Fair Labor Standards Act and defeats the purposes of that Act, in violation of Article VI[13] of the Constitution of the United States**

"It is familiar doctrine that the prohibition of a federal statute may not be set at naught, *or its benefits denied,* by state statutes or state common law rules. * * * To the federal statute and policy, conflicting state law and policy must yield. Constitution, Art. Art. VI, cl. 2" [italics supplied]. See *Sola Elec. Co.* v. *Jefferson Elec. Co.,* 317 U. S. 173, 176.[14] "The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land." *Kalb* v. *Feuerstein,* 308 U. S. 433, 439. As stated in an earlier decision of the Supreme Court (*Davis* v. *Wechsler,* 263 U. S. 22, 24–25):

> * * * Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights * * * is not to be defeated under the name of local practice. * * * If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. * * * This is familiar as to the substantive law and for the same reasons it is necessary to say that local practice shall not be allowed to put unreasonable obstacles in the way.

See to the same effect: *Savage* v. *Jones,* 225 U. S. 501, 533; *McDermott* v. *Wisconsin,* 228 U. S. 115, 132.

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[13] The pertinent portions of Article VI are quoted *supra,* p. 8, n. 12.

[14] In the *Sola* case the Supreme Court held that the state rules of estoppel would not be applied to preclude a patent licensee from challenging a price

Chapter 265 unreasonably interferes with enforcement of the Fair Labor Standards Act and the assertion of the federal rights provided by the Act in two ways: (1) it places "unreasonable obstacles in the way" of assertion of a remedy intended to insure to the wage earner full reparation for damages caused by the employer's failure to pay on time the statutory wages deemed by Congress essential to "the minimum standard of well-being" (see *Brooklyn Savings Bank* v. *O'Neil* (65 S. Ct. at 897); and (2) it seriously impairs the deterrent effect which Congress intended the Section 16 (b) liability to exert upon employers.

In a recent decision involving the nature of the right granted by Section 16 (b) (*Brooklyn Savings Bank* v. *O'Neil*, 65 S. Ct. 895, 896), the Supreme Court pointed out that the purpose of the Act was "to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce," and that the right granted by Section 16 (b) "constitutes a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency, and general well-being of workers' [Section 2 (a)] and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restoration of the worker to that minimum standard of well being." *Brooklyn Savings Bank* v. *O'Neil*, *supra*, p. 902. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, at 583. In other words, the right provided by Section 16 (b) "is granted in the public interest to effectuate a legislative policy" (65 S. Ct. at 901), and is a vital part of the basic policy underlying the Fair Labor Standards Act.

"The special nature of the rights of action" (see *Lamb* v. *Powder River Livestock Co.*, 132 Fed. 434, 442 (C. C. A. 8)) provided by Section 16 (b) of the Fair Labor Standards Act suffices to establish that they are not of a class that can be reasonably singled out to be subjected to a drastically reduced limitation period and that the exceptionally short period pro-

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fixing clause where the local rule of estopped would conflict with the Sherman Act's prohibition of price fixing.

vided by Chapter 265 defeats the purposes of the Federal legislation. As the United States Supreme Court recently observed in the case of *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda,* 321 U. S. 590, 597: "These provisions [the overtime provisions], like other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. We are not dealing here with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. These are the rights that Congress has specially legislated to protect." "Such a statute," said the Supreme Court, "must not be interpreted or applied in a narrow, grudging manner" (*ibid.*).

The appellant in the district court emphasized the burdens imposed upon employers in complying with the requirements of the Act, which burdens presumably will be more "equitably" allocated as between employer and employee as a result of the new statute of limitations. This argument completely overlooks the fact that a complex statute involving difficult questions of interpretation makes it at least equally imperative that employees be afforded an adequate time to ascertain their rights. Furthermore, by the express terms of the Act the burden of compliance is placed upon the employer. "*No employer* shall * * * employ any of his employees * * *" for overtime hours unless such employee receives the specified extra compensation. (Section 7 (a); italics supplied.) In *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, the Supreme Court specifically held that the circumstances that violations "resulted from an inability to determine whether the employee was covered by the Act" (p. 582) would not justify relieving the employer of the burden and shifting the onus to the employee. The Court said (p. 583):

> *Perplexing as petitioner's problem may have been, the difficulty does not warrant shifting the burden to the employee.* The wages were specified for him by the statute, and he was no more at fault than the employer. The liquidated damages for failure to pay the minimum wages under section 6 (a) and 7 (a) are compensation, not a penalty or punishment by the Government. [Italics supplied.]

Because the employee's right under Section 16 (b) is so basic to the Congressional policy and to the enforcement of the Fair Labor Standards Act, the Supreme Court in the *Brooklyn Savings Bank* case held that an employee could not agree to release that right even though the employer before suit was filed voluntarily paid the minimum and overtime compensation originally due. The same considerations of policy which led the Supreme Court to rule that the employee's right under Section 16 (b) cannot be waived or released, also demonstrate that the sharply reduced limitation period provided by Chapter 265 is in direct conflict with the Federal statute. The imposition of a singularly short limitation period is obviously not consistent with the Congressional purpose that an employee be fully restored for the damage caused by failure to pay on time the statutory requirements deemed essential to "the national health and well-being." It is peculiarly inappropriate to place a short, grudging, limitation period upon a right granted for this purpose.

The second respect in which Chapter 265 contravenes the Federal statute is that it substantially nullifies "the deterrent effect which Congress plainly intended that Section 16 (b) should have" (*Brooklyn Savings Bank* v. *O'Neil*, 65 S. Ct. 895, 903). The Supreme Court in the *Brooklyn Savings Bank* case pointed out that not only was the right granted by Section 16 (b) compensatory, but it was an enforcement measure which Congress intended should play a major part in securing compliance with the Act. "Although this right to sue is compensatory, it is nevertheless an enforcement provision. And not the least effective aspect of this remedy is the possibility that an employer who gambles on evading the Act will be liable for payment not only of the basic minimum originally due but also damages equal to the sum left unpaid" (*ibid.*). Chapter 265 by so drastically reducing the possibility that "an employer who gambles on evading the Act" will have to pay the full liability, defeats "not the least effective aspect of this remedy."[15]

[15] See also n. 16 of the opinion in *Brooklyn Savings Bank* v. *O'Neil*, 65 S. Ct. at 901: "The provision [Section 16 (b)] has the further virtue of minimizing the cost of enforcement by the Government. It is both a commonsense and economical method of regulation. The bill has other penalties for violations and other judicial remedies, but the provision which I have

That the six months period unreasonably interferes with the purposes of the federal act is apparent not only from "the special nature of the rights of action" but also from "the situation of the parties and other surrounding circumstances." See *Lamb* v. *Powder River Livestock Co.*, 132 Fed. 434, 442 (C. C. A. 8). It is common knowledge that unorganized workers for whose protection primarily the Fair Labor Standards Act was enacted, are, for the most part, too uniformed and too afraid of being discriminated against to exercise their rights. Experience shows that few suits are instituted under Section 16 (b) where employment has not previously terminated. The Supreme Court, in the *Brooklyn Savings Bank* case, expressly took notice of "the unequal bargaining power" of the unorganized, low paid employees. A period as short as that provided by Ch. 265 would bar such employees from recovering not only the liquidated damage amount but also the underpayment of statutory overtime.

Contrary to appellant's contention, it is not the normal or natural thing for such an employee to assert his claim promptly. The worker who needs his job will, in all good faith and without any thought of accumulating liquidated damages, proceed cautiously before asserting his rights. Moreover, frequently the employee, with his inferior resources, is totally unaware that he is entitled to more than his employer is paying him. If the employer's problems are as preplexing as respondents assert, the employee certainly is in no position to have greater knowledge of his rights. He does not have the benefit of continuous advice of counsel, as do most employers, nor does he have access to the records and information which show the

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mentioned puts directly into the hands of the employees who are affected by violation the means and ability to assert and enforce their own rights, thus avoiding the assumption by Government of the sole responsibility to enforce the Act." Douglas B. Maggs, former Solicitor of Labor, testifying before Subcommittee No. 4 of the House Judiciary Committee, on July 2, 1945, stated as follows regarding H. R. 2788, 79th Cong., a proposed bill to provide a uniform Federal statute of limitations: "If voluntary compliance with the provisions of the Act lessens as a result of dilution of the effectiveness of the employee suit provision, there will be added pressure on Government to utilize its enforcement powers with a consequent increase in demands for increased appropriations and personnel."

relation of his work to interstate commerce or to the production of goods for interstate commerce, nor does he normally keep records of wages and hours which most employers keep as a matter of business practice or because required by law.

It must be remembered, too, that the employee is not granted the investigatory powers conferred upon the Administrator. Therefore employees frequently await an inspection by the Administrator to determine whether they are entitled to more than has been paid. The Administrator may induce the employer to make reparation voluntarily and thus save the employee the burden of litigating and the risk of inviting retaliatory measures. The employee should have a reasonable opportunity to secure voluntary payment under the auspices of the Administrator. The Administrator's inspection staff, of course, is limited and may not get around to inspecting a particular business more than once in two or three years. Even where there is a complaint or an inquiry, it will frequently require more than six months to arrange and complete an investigation. Thus the six months' limitation period deprives the employee of the assistance of his best, if not his only, source of information regarding his rights. He is entitled to an opportunity to secure this assistance before risking his tenure and relations with his employer by instituting suit.

We submit, therefore, that the same policy considerations which led the Supreme Court to forbid a waiver or release of the employee's rights under Section 16 (b) demonstrate that the extraordinarily short limitation period provided by Chapter 265 defeats the basic purpose of the Fair Labor Standards Act and therefore cannot validly be applied to claims under that Act.

## III

### Chapter 265 unreasonably interferes with and encroaches upon Federal regulation of interstate commerce in violation of Article I, Section 8 of the Constitution of the United States

A State statute which interferes with a Federal law enacted to regulate interstate commerce, violates not only Article VI,

but also the Commerce Clause[16] of the Constitution. "The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method," said the United States Supreme Court in the case of *South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 185. The decisions of the Supreme Court have recognized the invalidity of state legislation which though "nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state." *Id.* at 185–186. Where Congress enacts legislation regulating interstate commerce "local rules * * * will not be permitted to thwart the purposes" of the national regulation. *Sola Electric Co.* v. *Jefferson Elec. Co.*, 317 U. S. 173; *Chesapeake & Ohio Ry. Co.* v. *Martin*, 283 U. S. 209, 222; and state legislation which substantially impairs "uniformity in the regulation of the commerce in matters of national concern" (see *California* v. *Thompson*, 313 U. S. 109, 116) or unreasonably interferes with the "impartial application" of the Federal regulation (see *Southern Ry. Co.* v. *Reid*, 222 U. S. 424, 442) cannot be sustained. See also *The Minnesota Rate Cases*, 230 U. S. 352, 399–400; *New York Cent. R. R. Co.* v. *Winfield*, 244 U. S. 147, 153; *Kansas City So. Ry.* v. *Van Zant*, 260 U. S. 459, 468–469; *Missouri Pac. R. R. Co.* v. *Porter*, 273 U. S. 341.

It was on this ground that the district court held the 90-day provision of Chapter 265 unconstitutional and void, stating that "It unreasonably interferes with the power of Congress to regulate commerce among the several states * * *" (R. 33–34). We think this ruling applicable to both the 90-day and the six months provision of Chapter 265.

The Fair Labor Standards Act is a statute regulating interstate commerce in a matter of "national concern." The Act establishes "a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities in the United States under labor conditions as

[16] The Commerce Clause provides: "The Congress shall have power * * * To regulate Commerce with foreign Nations, and among the several States, * * *."

respects wages and hours which fail to conform to standards set up by the Act." *United States* v. *Darby,* 312 U. S. 100 at 109. One of its main purposes is "to prevent the use of interstate commerce as a means of competition in the distribution of goods so produced, and as the means of operating and perpetuating such substandard labor conditions among the workers of the several states." *Id.* at 109–110. "The motive and purpose of the * * * regulation are plainly to make effective a congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows." *Id.* at 115. The Supreme Court has recognized that this purpose calls for "equality of treatment" and implies a "Congressional policy of uniformity in the application of the provisions of the Act to all employers subject thereto" (*Brooklyn Savings Bank* case, 65 S. Ct. 895, 902).

Accordingly, a State statute, even though "nominally of local concern," which operates to relieve employers substantially of their liability under Section 16 (b) and thereby to give local employers a competitive advantage over employers in other States, and to deny local employees the full benefits of the national law, conflicts with the national regulation of interstate commerce.[17] Chapter 265, though nominally no more

[17] See *Southern Pac. Co.* v. *State of Arizona,* 65 S. Ct. 1515, a recent decision of the Supreme Court holding that "the State interest cannot be preserved at the expense of the national interest by an enactment which regulates interstate train lengths * * *." Although the State law was designed to safeguard transportation within the State "the practical effect of such regulation is to control train operations beyond the boundaries of the State * * *. The serious impediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having a nation-wide authority are apparent." The Court concluded that "the principle that, without controlling Congressional action, a State may not regulate commerce so as to * * * deprive it of needed uniformity in its regulation is not to be avoided by 'simply invoking the convenient apologetics of the police power.'" The court distinguished *South Carolina* v. *Barnwell, supra,* p. 16, on the ground that the regulation affecting interstate commerce in that case was "peculiarly of local concern."

than a local statute of limitations, does thus encroach upon the basic national policies. It is not designed merely to fix an ordinary limitation period; as we have shown, the considerations legitimately bearing on such a procedural matter would not have warranted so drastic a reduction in the period. The consideration which actually influenced the enactment of the reduced period was the State policy to relieve local employers from the full impact of the Fair Labor Standards Act and thus encourage business interests to settle in the State—a policy directly opposed to the manifest and basic policy of the Federal statute. The local objective thus sought is a particularly objectionable encroachment upon national power to regulate interstate commerce. "A chief occasion of the commerce clause was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.'" If such state action should be sustained, "the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." See *Baldwin* v. *Seelig,* 294 U. S. 511 at 522.

It is recognized that the absence of a provision in the Act fixing the limitation period necessarily means some lack of uniformity in the application of the statute because of the varying periods in the applicable State statutes of limitations. However, none of the relevant State statutes in effect at the time of the enactment of the Act provided a period of less than one year. Under the statutes of limitation in effect in most of the States at the time of the enactment of the Act, claims under Section 16 (b) would be regarded as statutory or contractual, subject in most states to limitation periods ranging from three to six years—in the majority of instances six years. (See attached table [18] showing the limitation periods in the various states on statutory or contractual claims at the time of the enactment of the Fair Labor Standards Act.) While the periods differed somewhat in the different States, the period in every State was at least one year. As the Federal district court in Iowa pointed out, in holding the Iowa six-months statute invalid, it is one thing to apply "the general statute of limita-

[18] Appendix, p. 24.

tion of a State" where the Federal statute provides no limitation period, but it is quite a different matter for the State to undertake affirmatively "to regulate and determine the time when actions may be brought under federal statutes." *Kappler* v. *Republic Pictures Corp.*, 59 F. Supp. 112, 116–117 (S. D. Iowa). Certainly Congress did not intend to permit the individual States to cut short the rights under the Act so as to secure a competitive advantage for local business, nor can the Rules of Decision Act reasonably be interpreted as authorizing such State action.

IV

**Chapter 265 does not allow a reasonable time for claimants to resort to the courts and thus denies employees due process of law in violation of the 14th Amendment to the Constitution of the United States**

Although concededly State legislatures have general power to reduce the time for bringing actions on both accrued claims and those which may accrue in the future (*Terry* v. *Anderson*, 95 U. S. 628), "it is the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought; * * * and a statute that fails to do this cannot possibly be sustained as a law of limitation, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law." *Lamb* v. *Powder River Livestock Co.*, 132 Fed. 434, 439 (C. C. A. 8). "Perhaps no better rule as to what is a reasonable time can be laid down than that it must be of sufficient duration to afford full opportunity for resort to the courts for the enforcement of the rights upon which the limitation is intended to operate * * *" (*ibid.*). "All statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitation but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions." *Wilson* v. *Iseminger*, 185 U. S. 55, 62.

Of course, "no one rule as to the length of time as would be deemed reasonable can be laid down for the government of all cases alike. Different circumstances will often require a different rule." *McGahey* v. *Virginia,* 135 U. S. 662. "What is reasonable in a particular case depends upon its particular facts." *Terry* v. *Anderson,* 95 U. S. at 633.

The particular facts and circumstances relating to the enforcement of claims under the Fair Labor Standards Act show conclusively, we submit, that the limitation period provided by Chapter 265 is entirely unreasonable. "It is usual in prescribing periods of limitation to adjust the time to the special nature of the rights of action to be affected, the situation of the parties, and other surrounding circumstances," said the Court in the *Lamb* case, *supra,* 132 Fed. at 442. As we have shown in previous sections of this brief, "the special nature of the rights of action" which Chapter 265 so stringently limits, is such as to call for a particularly liberal rather than a grudging allowance. Apart from the Congressional intent that the Section 16 (b) remedy should serve as an enforcement measure in the public interest, "the position of the parties" and other realistic considerations confirm the conclusion that the six-months period is too short for the assertion of such rights. We have previously referred to the problems inherent in the relationship between the parties. The "unequal bargaining power as between employer and employee" and the low-wage employee's dependence upon his job make wholly unwarranted appellant's assumption that cutting short the remedy of employees will prompt a more speedy assertion of wage claims. No realistic appraisal of these circumstances could lead to the conclusion that the limitation period provided in Chapter 265 affords employees a reasonable opportunity to resort to the courts. The fact is that the State legislature did not concern itself with adjusting the time limit to this end, but was concerned with other objectives.

No facts nor any sound reasons have been adduced to support the radical reduction of the limitation period which Chapter 265 imposes. The only argument advanced by the appellant is that employers have difficulty determining their rights under the Act. The difficulties of interpretation under

the Act emphasized by the appellant rather than constituting a justification for the enactment of Chapter 265 support our position that this statute imposes an unreasonable burden on employees in compelling them to ascertain their rights and to become educated to the perplexing problems arising under the Act within the curtailed period.

It is idle to say that because the employee is "pay conscious," he is better aware of his rights than is the employer and should be compelled to act promptly. This argument disregards the realties of the employer-employee relationship and ignores the very considerations which should control in determining what is a reasonable limitation period. For example, as pointed out above, the employee's resources in securing legal advice and information are usually much inferior to the employer's.

Of particular significance is the fact that the six-month limitation period is unusually short for any kind of claim and particularly for any claim comparable to those included in Chapter 265. There is nothing comparable among the various Oregon statutes of limitations O. C. L. A. 1–201 to 1–211), and nothing comparable among the statutes of limitations of any of the other states, except the Iowa statute prescribing a six-months limitation on Federal statutory claims, which has been held unconstitutional and repealed. See *supra,* page 5.

Appellant, in support of the argument that the period provided by Chapter 265 is not unusual or unreasonable, points to a number of statutes of limitations prescribing a six-months period on certain kinds of claims. But the claims covered by such statutes are wholly different in nature from the claims which Chapter 265 covers, and involve entirely different policy considerations. The statutes of limitations cited by appellant all relate to types of claims which long established public policy dictates should be settled or litigated within the shortest possible time after accrual. These statutes fall into a few principal categories according to the dominant public policy which motivates the need for prompt disposal of the particular type of action. (1) The free transferability or alienability of property requires that actitons to redeem land sold for nonpayment

of taxes or mortgages shall be promptly instituted.[19] This consideration also governs the statutes providing for prompt settlement of claims against decedents' estates. The provision of short limitations in labor lien laws is partly induced by the desire not to encumber property titles as well as by the consideration that the preferential claim for labor or service is a statutory grant in addition to the basic, separate right to sue for services rendered.[20] (2) The security of state and public affairs requires that proceedings to contest elections be brought promptly. (3) The nature of the evidence requires that actions arising out of personal injuries be instituted promptly. See *Canadian Northern Ry Co.* v. *Eggen,* 252 U. S. 553, 561, where the Court held a limitation of one year not unduly short "having regard to the likelihood of the dispersing of witnesses to accidents * * *, their exposure to injury and death, and the failure of memory as to the minute details of conduct on which questions of negligence so often turn." In addition, the courts point out that complainants in personal injury actions have actual notice of the wrong or injury at the time it is committed and "it is deemed no hardship" to require early suit. See *Lenawee County* v. *Nutten,* 208 N. W. 613; *Steele* v. *Gann,* 197 Ark. 480, 123 S. W. (2d) 520; and *Mulvey* v. *City of Boston,* 197 Mass. 178, 83 N. E. 402, 404. The undersirable social implications of outstanding claims for such personal injuries as libel, slander and alienation of affections have motivated short statutes of limitations. See *Borchert* v. *Bash,* 97 Neb. 593, 150 N. W. 830.

The circumstances relied upon to justify the short limitations periods for the above types of claims are completely absent with respect to the claims affected by Chapter 265. As we have shown, the public policy considerations as well as all other pertinent considerations relating to claims under the Fair Labor Standards Act are clearly opposed to an unusually short limitation period.

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[19] See *Turner* v. *New York,* 168 U. S. 90; *Saranac Land Co.* v. *Comptroller of New York,* 177 U. S. 318; and *Moons* v. *Carter,* 46 N. J. Law 266.

[20] See *Bowery* v. *Babbit,* 128 So. 801, 99 Fla. 1151.

## CONCLUSION

The court below correctly ruled that Chapter 265 is unconstitutional and void and does not bar plaintiff's cause of action under the Fair Labor Standards Act.

The judgment below should be ~~reversed~~ affirmed.

Respectfully submitted.

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OCTOBER 1945.

## APPENDIX

[Statutes of Limitation in Effect in 1938]

*Alabama:*

Actions founded on promises in writing (not under seal) 6 years (Title 7 #21).

Actions upon any simple contract (Title 7 #21) 6 years (Code of Alabama 1940).

*Arizona:* Action upon a liability created by statute, 1 year (Code of Arizona 1939—#29–201).

*Arkansas:*

Instruments in writing not under seal, 5 years (#8933).

All other actions not included in other provisions, 5 years (#8938).

(Digest of Stats. of Ark. 1937).

*California:* Action upon a liability created by statute, 3 years (California Code of Civil Procedure, 1937, #338 (1)).

*Colorado:* All actions of debt founded upon any contract, 6 years (Colorado Stat. Ann. 1935, Ch. 102, #1).

*Connecticut:*

Contract in writing, 6 years.

Oral contract, 3 years.

(General Stat. of Conn. 1930, Sec. 6005.)

*Delaware:* Actions of debt, 3 years (Rev. Code of Del. 1935—#5129).

*District of Columbia:* Contracts express or implied, 3 years (D. C. Code 1940 Edition, #12–201).

*Florida:* Action upon a liability created by statute, 3 years (Florida Statutes 1941, Title VIII, 95.11).

*Georgia:*

Statutory rights, 20 years.

Simple contracts in writing, 6 years.

(Georgia Code 1933 (3–704.)

*Idaho:* Action on liability created by statute, 3 years (Idaho Code Ann. (1932 Official edition) 5–218).

*Illinois:*

Actions on unwritten contracts express or implied, 5 years (#16).

Written contracts, 10 years (#17).

(Illinois Revised Statutes 1943, Ch. 83, #16 and 17.)

*Indiana:*

Contracts in writing, 6 years.

Contracts in writing other than those for the payment of money, 20 years.

(Baldwin's Indiana Statutes Ann. 1934, #61.)

*Iowa:*

Unwritten contracts, 5 years (subparagraph 5).

Written contracts, 10 years (subparagraph 6).

(Code of Iowa, 1939, Ch. 487, #11007.)

*Kansas:* Action on liability created by statute, 3 years (General Statutes of Kansas (Ann.) 1935, #60–306).

*Kentucky:* Action on liability created by statute, 5 years (Kentucky Rev. Statutes 1942, 413.120).

*Louisiana:* Actions of workmen, laborers, and servants for the payment of their wages, 1 year (La. Civil Code Ann. 1932, Art. 3534).

*Maine:* Actions on contract, 6 years (Maine Rev. Stat. 1930, Ch. 95, Sec. 90).

*Maryland:*

Action on a specialty, 12 years.

(Maryland Ann. Code, 1939; Article 57, #1.)

*Massachusetts:* Actions of contract founded upon contract or liability express or implied, 6 years (General Laws of Mass. 1932, Ch. 260, Sec. 2).

*Michigan:* All personal actions, 6 years (Compiled Laws of Mich. 1929, #13976).

*Minnesota:* Action on liability created by statute, 6 years (Minn. Stats. 1941, Vol. 2, Ch. 541.05).

*Mississippi:*

All actions for which no other period of limitation is prescribed (covers written contracts), 6 years.

Any unwritten contract, express or implied, 3 years.

(Miss. Code 1942 Ann., #722 and #729.)

*Missouri:* Action upon a liability created by statute, 5 years (Revised Stats. of Mo. 1939, #1014).

*Montana:* Action on liability created by statute, 2 years (Montana Rev. Code 1935, #9033).

*Nebraska:* Action on liability created by statute, 4 years (Revised Stats. of Neb. 1943, Ch. 25, 206).

*New Hampshire:*

Contracts under seal, 20 years.

All other personal actions, 6 years.

(Revised laws of New Hampshire, 1942, Ch. 385.)

*New Jersey:* Actions in the nature of debt founded upon contract, 6 years (Rev. Stats. of New Jersey 1937, 2: 24–1).

*New Mexico:*

Contract in writing, 6 years (#27–103).

Unwritten contracts, 4 years (#27–104).

(Stats. of New Mexico, 1941 Ann.)

*New York:* Liability created by statute, 6 years (Cahill's N. Y. Civil Practice Act (7th Ed.), section 48 of the New York Civil Practice Act).

*North Carolina:* Actions upon a liability created by statute, 3 years (Gen. Stats. of N. C. 1943, #1–52).

*North Dakota:* Action on right created by statute, 6 years (Revised Code of N. D. 1913, Sec. 7375).

*Ohio:* Contract not in writing or action on liability created by statute, 6 years (Throckmorton's Ohio Code Ann. 1940, #11222).

*Oklahoma:* Action on liability created by statute, 3 years (Stats. of Okla. 1941, Title 12, #95 (2d)).

*Oregon:* Action upon a liability created by statute, 6 years (Oregon Compiled Laws Ann. 1940, #1–204).

*Pennsylvania:* Actions of debt grounded on contract, 6 years (Purdon's Pennsylvania Stats. 1936, Title 12, #31).

*Rhode Island:* All actions of debt founded upon any contract, 6 years (General Laws of Rhode Island 1938, Ch. 510, Sec. 3).

*South Carolina:* Actions on liability created by statute, 6 years (Code of Laws of South Carolina 1942, #388).

*South Dakota:* Actions upon liability created by statute, 6 years (S. D. Code of 1939, 33.0232).

*Tennessee:* Actions on contracts, 6 years (Code of Tenn. 1932, #8600).

*Texas:*

Actions for debt where the indebtedness is founded upon any contract in writing, 4 years (Article 5527).

Actions for debt where the indebtedness is not evidenced by a contract in writing, 2 years (Article 5526).

(Vernon's Texas Stat. 1936.)

*Utah:*

Written contracts, 6 years (104–2–22).

Contracts not in writing, 4 years (104–2–23).

(Utah Code Ann. 1943.)

*Vermont:* Actions on contract, 6 years (Public Laws of Vermont 1933, Sec. 1648).

*Virginia:*

Contract in writing but not under seal, 5 years.

Oral contract, 3 years.

(Virginia Code of 1942—Title 57, Ch. 238, #5810.)

*Washington:* [21]

Action on contract in writing, 6 years (#156).

Action on contract not in writing, 3 years (#159).

(Remington Revised Stats. of Wash. Ann. 1932, Title 2, Ch. 3.)

*West Virginia:*

Contracts in writing, 10 years.

Oral contracts, 5 years.

(Official Code of W. Va. 1931, Ch. 55—Article 2; #6.)

*Wisconsin:* Action on liability created by statute, 6 years (Wis. Stats. 1943, Ch. 330.19).

*Wyoming:*

Contracts in writing, 10 years (89–409).

Actions on liability created by statute, 8 years (89–410).

(Wyo. Rev. Stats. 1931.)

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[21] However, see *Cannon* v. *Addison Miller*, 9 Labor Cases 62, 546, where the Washington Supreme Court applied the two-year catch-all statute since the State had no statute of limitations in actions for liabilities created by statute.

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